

CORRESPONDENCE
BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FILE
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MAR 16 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Application of

ELLIS THOMPSON CORPORATION

For facilities in the Domestic Public Cellular Radio
Telecommunications Service on Frequency Block
A in Market No. 134, Atlantic City, New Jersey.

CC Docket No. 94-136

To: Honorable Joseph Chachkin
Administrative Law Judge

OPPOSITION TO DOCUMENT PRODUCTION REQUEST

Telephone and Data Systems, Inc. (TDS) files herewith, by its attorneys, its Opposition to the Document Production request of American Cellular Network Corp. d/b/a Comcast Cellular (Amcell).

By letter of January 10, 1995, Amcell advised TDS of the documents which Amcell desires to have TDS produce in this proceeding. A copy of the request is attached. At the prehearing conference held on January 27, 1995, the Presiding Administrative Law Judge ordered the parties to which document production requests had been submitted either to produce the requested documents or to file their objections thereto by March 16, 1995.

The *Memorandum Opinion and Order and Hearing Designation Order* in this proceeding, released on November 28, 1994 (FCC 94-298) (*HDO*), looks to a determination of

“Whether American Cellular Network Corporation is a real-party-in-interest in the application of Ellis Thompson Corporation for a cellular radio system on frequency Block A in Atlantic City, New Jersey and, if so, the effect on Ellis Thompson Corporation's qualifications to be a Commission licensee.”

From the text of the *HDO*, it is evident that the Commission also contemplates the adduction of evidence concerning, and a determination of, whether Amcell at any time assumed *de facto* control over the Atlantic City cellular system. However, the *HDO* includes no issue concerning TDS,¹ and

¹ As used here, “TDS” included TDS subsidiaries, including United States Cellular Corp. and its various subsidiaries.

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"Whether American Cellular Network Corporation is a real-party-in-interest in the application of Ellis Thompson Corporation for a cellular radio system on frequency Block A in Atlantic City, New Jersey and, if so, the effect on Ellis Thompson Corporation's qualifications to be a Commission licensee."

From the text of the *HDO*, it is evident that the Commission also contemplates the adduction of evidence concerning, and a determination of, whether Amcell at any time assumed *de facto* control over the Atlantic City cellular system. However, the *HDO* includes no issue concerning TDS,¹ and

¹ As used here, "TDS" included TDS subsidiaries, including United States Cellular Corp. and its various subsidiaries.

contemplates no inquiry into the conduct of TDS. It does not call for a determination of whether TDS has assumed *de facto* control of any cellular system, nor does it contemplate use of TDS as a "yardstick" for the determination of whether Amcell assumed *de facto* control over the Atlantic City cellular system or otherwise became a real-party-in-interest with respect to the Thompson application. The documents which Amcell has asked TDS to produce generally have no relevance to the designated issues, nor would their production would lead to the discovery of relevant evidence. Since TDS owns in whole or in part and/or manages more than one hundred and forty cellular systems across the United States, production of the requested documents pertaining to each of those systems would be burdensome in the extreme. TDS therefore opposes the request.

Amcell's numbered request 1 seeks "all documents reflecting, referring or relating to actions, dealings or communications by, between or among" TDS, Thompson and/or Amcell concerning the Atlantic City system "or to the application of FCC rules and policies thereto." The request is excessively broad and seeks internal TDS documents and other documents not disseminated to either Thompson or Amcell, which have can have absolutely no relevance under the designated issue. The issue in this proceeding is not what TDS may have thought about the Amcell - Thompson relationship, whether TDS was right or wrong, or even about the steps TDS may have taken or considered taking to prevent Amcell from assuming control over the Atlantic City system from Thompson. The issue here is limited to what Amcell and Thompson did. TDS therefore objects to the production of any such documents.

Amcell numbered request 2 seeks documents pertaining to TDS's views concerning all aspects of the proposed construction and operation of the Atlantic City system by TDS and Amcell. Again, the issue in this proceeding is not what TDS may have thought about the Amcell - Thompson relationship, whether TDS could have done a better job of constructing the system than Amcell, or whether TDS's views on these and other matters were sound or otherwise. The requested documents could have affected Amcell's conduct toward Thompson and/or the Atlantic City system only to the extent that they contemporaneously came into Amcell's possession, and whether they did so has at most extremely tenuous relevance to the issue in this proceeding. We assume that

Amcell remains in possession of any such documents, and that it does not desire us to produce duplicates.² TDS therefore objects to the production of any documents in this category.

Amcell numbered request 3 seeks documents related to TDS's construction of other cellular systems and, in particular, to the use of equipment manufactured or supplied by Northern Telecom. The way in which TDS constructed other cellular systems, and whether TDS used Northern Telecom equipment in those other systems, is not probative in any sense of the only issue in this proceeding, viz, whether Amcell assumed *de facto* control over the Atlantic City system or otherwise became a real party in interest with respect to it. The requested documents have no apparent relevance under the designated issue, and TDS accordingly objects to their production.

Amcell numbered request 4 also seeks documents related to TDS's construction and operation of other cellular systems in other markets. For the same reason set forth with respect to Amcell numbered request 3, the requested documents have no apparent relevance under the designated issue, and TDS objects to their production.

Amcell numbered requests 5 - 9 seek truly voluminous documents related to nearly all aspects of the cellular activities of TDS in more than one hundred and forty markets where it manages or has managed cellular systems. They contemplate a broad-based examination of all documents relating to those activities, without regard to their proprietary, confidential or privileged nature, evidently so that Amcell can attempt to use TDS as a yardstick for the evaluation of Amcell's own activities in the Atlantic City market. The broad ranging inquiry proposed by Amcell into those activities is patently irrelevant under the designated issue and TDS therefore objects to the production of any of the requested documents.

Amcell numbered request 10 references statements of United States Cellular Corp. President H. Donald Nelson dated July 6, 1988 and July 27, 1988, and of United States Cellular Corp. Vice President - Engineering Richard W. Goehring dated July 22, 1988 and July 27, 1988. Those statements express TDS's views and contentions concerning the proposed construction of the

² If and to the extent that the Wireless Telecommunications Bureau desires copies of documents which are not being produced because Amcell already has copies, TDS will provide them upon request.

Atlantic City cellular system by Amcell. TDS's views on these matters are plainly irrelevant under the designated issue and TDS objects to the production of documents concerning them.

Amcell numbered request 11 seeks all documents which might support, refute or pertain to TDS's allegations that Amcell assumed *de facto* control over the Atlantic City system. Amcell request 12 seeks "all documents that are relevant to the issue designated" for hearing. Amcell request 13 seeks all documents related to the conduct of Thompson with respect to the *Intermountain Microwave* criteria. Amcell request 14 seeks "all documents TDS intends to introduce at the hearing in this matter." Amcell request 17 seeks "all documents that would be responsive to any TDS request to Amcell" for the production of documents. Each of these requests is so excessively broad that production would be impossible. TDS previously filed various documents with the Commission as attachments to its pleadings during the earlier phase of this proceeding which ultimately led to the designation of Thompson's application for hearing. We assume that Amcell is already in possession of those documents and does not desire TDS to produce copies now. It is TDS's intention to submit copies of those documents, and perhaps others produced by Thompson - ETC - Amcell during discovery, as part of its direct case in this proceeding.

Amcell numbered request 15 seeks all documents relating to Thompson, Amcell, or the Atlantic City system prepared by, reviewed by, or addressed to, any witness whose testimony TDS intends to submit at the hearing. TDS has no present intention to offer the testimony of any witness who prepared or reviewed, at TDS's request, any documents concerning Thompson, Amcell, or the Atlantic City system. To the extent that the request seeks documents prepared by, reviewed by, or addressed to Thompson, Amcell and their representatives, TDS does not now know which of them if any it intends to call as witnesses in this proceeding.

Amcell numbered request 16 seeks all affidavits, depositions and hearing testimony given by TDS representatives before all state and federal bodies relating to real party in interest, transfer of control, and *Intermountain Microwave* control criteria. It is not limited to any such affidavits, depositions and testimony related to the Atlantic City system and therefore goes far beyond the scope of this proceeding, which involves only the interrelationships of Thompson and Amcell. TDS

therefore objects to the production of any such documents which do not relate to the Atlantic City system. Any such affidavits, depositions or hearing testimony presented in proceedings involving the Atlantic City system are already in Amcell's possession, since there have been no such proceedings in which Amcell was not a party, and TDS objects to their production as well.

TDS therefore asks that it be required to produce none of the documents requested by Amcell.

Respectfully submitted,
Telephone and Data Systems, Inc.

By /s/ Alan Y. Naftalin
Alan Y. Naftalin

By /s/ Herbert D. Miller, Jr.
Herbert D. Miller, Jr.

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By /s/ Alan N. Salpeter
Alan N. Salpeter

By /s/ Michele Odorizzi
Michele Odorizzi

By /s/ Howard I. Roim
Howard I. Roim

By /s/ Demetrious G. Metropoulos
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190 SOUTH LA SALLE STREET
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March 16, 1995

Its attorneys

AN
DPC

GURMAN, KURTIS, BLASK & FREEDMAN

CHARTERED

SUITE 500
1400 SIXTEENTH STREET, N.W.
WASHINGTON, D.C. 20036(202) 328-8200
TELECOPIER (202) 462-1784**DOCUMENT TRANSMISSION FORM**TO: Alan Y. Naftalin, Esq./Herbert D. Miller, Jr., Esq.TELECOPIER PHONE: (202) 467-5915FROM: Louis GurmanTIME: 5:50 pmDATE: January 10, 1995REFERENCE #: 266-1**CONFIDENTIALITY NOTE:**

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This transmission consists of a total of 37 pages (including this page). If you have any problems with this transmission, please call (202) 328-8200 and ask for Ruth.

GURMAN, KURTIS, BLASK & FREEDMAN

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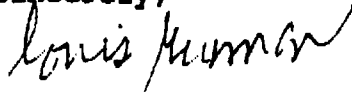
January 10, 1995

BY FACSIMILE AND FIRST-CLASS MAILAlan Y. Naftalin, Esquire
Herbert D. Miller, Jr., Esquire
Koteen & Naftalin
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David A. Lokting, Esquire
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Stoll, Stoll, Berne, Fischer,
Portnoy & Lokting
209 S.W. Oak Street
Portland, Oregon 97204Joseph Paul Weber, Esquire
Terrence E. Reideler, Esquire
Federal Communications
Commission
Wireless Telecommunications
Bureau
1919 M Street, N.W., Room 644
Washington, D.C. 20554Re: In re Application of
Ellis Thompson Corporation

Gentlemen:

In accordance with our agreement on discovery matters, American Cellular Network Corp. d/b/a Comcast Cellular hereby submits the requests for production of documents by TDS attached hereto.

Sincerely,



Louis Gurman

Attachment

DOCUMENT REQUESTS

Amcell hereby requests TDS to produce the documents in its possession, custody or control specified in the numbered paragraphs below. References to TDS include USCC, all subsidiaries and affiliated companies of TDS and USCC, and all companies owned or controlled by or under common control with either of them, directly or indirectly. References to Amcell include Comcast Corporation, American Cellular Network Corp. (d/b/a Comcast Cellular), all subsidiaries and affiliated companies of Comcast Corporation and American Cellular Network Corp., and all companies owned or controlled by or under common control with either of them, directly or indirectly, including without limitation Amcell of Atlantic City, Inc. References to Thompson include Ellis Thompson, Ellis Thompson Corporation and ET Corporation. References to TDS, Amcell or Thompson include their respective officers, directors, employees, agents, attorneys, consultants and representatives, and all other persons acting, purporting to act or believed to be acting on their behalf. Documents requested are not limited to writings, but include all media and means of recording and storing verbal, numerical, auditory or visual information, including without limitation computer tapes, discs and memory. The time period of the requested documents is not limited except as specifically indicated.

1. All documents reflecting, referring or relating to actions, dealings or communications by, between or among TDS, Thompson and/or Amcell with respect to the non-wireline cellular telephone system to serve the Atlantic City, New Jersey MSA market ("Atlantic City System"), or to the application of FCC rules and policies thereto.

2. All documents relating to the engineering, design, equipment, features, capabilities, construction, actual or projected cost or operating economics of the Atlantic City System, including without limitation:

- a. All documents reflecting, referring or relating to any consideration, evaluation, studies, designs, pricing or cost analyses of, or proposals or possible proposals with respect to, the engineering, design, equipment or cost of an Atlantic City System to be constructed by TDS;
- b. All documents, reflecting, referring or relating to any consideration, study or evaluation by TDS of the technical, operational, financial or economic characteristics or merits of any proposal or agreement for the construction of an Atlantic City System by Amcell, or the Atlantic City System actually constructed by Amcell;
- c. All documents referring, relating to, analyzing or comparing the relative technical, operational,

financial or economic characteristics or merits of Atlantic City Systems constructed or proposed to be constructed by TDS and Amcell;

- d. All documents referring or relating to the possible use of a Northern Telecom cellular telephone system switch ("Switch") in the Atlantic City System; and
- e. All documents referring, relating to, analyzing or comparing the respective economic, financial, operational or commercial benefits, drawbacks, advantages or disadvantages of using or not using a Motorola, Northern Telecom, or any other make of Switch in the Atlantic City System.

3. a. All documents constituting, reflecting, referring or relating to any contracts, agreements or understandings to which TDS was a party in the 1986-1988 period that required, contemplated, permitted or related to the acquisition or purchase of Northern Telecom Switches by or for one or more cellular systems owned, controlled or managed by TDS.

b. All documents referring or relating to the use of Northern Telecom Switches in the non-wireline cellular telephone systems operated by TDS serving the Poughkeepsie, New York and Manchester-Nashua, New Hampshire MSA markets, including without limitation all documents reflecting, referring or relating to: any decision to use Northern Telecom Switches (or not to use any other make of Switch) in such systems; incorporating or failing to incorporate such systems in wide-area networks with other cellular systems in the Northeastern United States using other makes of Switch; any consideration of replacing or decision to replace Northern Telecom Switches in such systems with Switches manufactured by Motorola or any other company; or any communications between TDS and any other person or organization with respect to any of the foregoing.

4. All documents referring or relating to the use in any cellular telephone system owned, controlled or managed by TDS of a Switch made by a different manufacturer than those used by one or more adjacent or nearby cellular systems, including without limitation all documents reflecting, referring or relating to: any recommendations or decisions made by TDS with respect thereto; any evaluation or consideration by TDS of the technical, financial, economic, operational or competitive consequences, benefits, drawbacks, advantages or disadvantages of using such a different Switch; or any communications between TDS and any other person or organization with respect to any of the foregoing.

5. All documents referring or relating to the integration of cellular telephone systems in wide area networks, including without limitation all documents referring, evaluating or relating to the

technical, financial, economic, operational or competitive consequences, benefits, drawbacks, advantages or disadvantages of participating or not participating in a wide area network; and all documents referring or relating to any decision by or on behalf of any cellular telephone system owned, controlled or managed by TDS to participate or not to participate in a wide area network.

6. All documents discussing, evaluating or relating to the integration of cellular systems using Switches produced by different manufacturers into a wide-area network, including without limitation:

- a. All documents discussing, evaluating or relating to the feasibility of such integration in the 1986-1988 period;
- b. All documents reflecting, referring or relating to estimates or predictions of whether, when and/or to what extent such integration would or might become feasible;
- c. All documents reflecting, referring or relating to the nature or development of equipment and/or software that would make such integration feasible;
- d. All documents reflecting, referring or relating to the timing and results of the development, testing and implementation of such equipment and/or software; and
- e. All documents reflecting, referring or relating to the actual, proposed or planned integration of any cellular telephone system owned, controlled or managed by TDS into a wide-area network with one or more other cellular systems using a Switch produced by a manufacturer other than the one that produced the Switch used in the TDS system.

7. All contracts and agreements pursuant to which TDS at any time has managed a cellular telephone system of which it was not the FCC-authorized controlling owner, and all documents reflecting, referring or relating to TDS' policies and practices, or to the licensee's participation or involvement with, or supervision or oversight of, TDS in TDS' execution and fulfillment of its managerial responsibilities pursuant to such contracts and agreements, including without limitation with respect to the following matters:

- a. control of daily operations;
- b. Engineering and technical planning and policies;

- c. Sales, marketing, advertising and promotional activities and policies;
- d. Pricing decisions and policies;
- e. Budgeting, capital expenditures and strategic planning;
- f. Payment of financing obligations and operating expenses;
- g. Control of system bank accounts, checkwriting authority, and approval of expenditures;
- h. Personnel policies, and the hiring, supervision and dismissal of employees, consultants, accountants, auditors and attorneys;
- i. Lease, purchase or construction of system facilities and transmitting antenna sites;
- j. Use and ownership of, and access to, system facilities and equipment;
- k. Determination and effectuation of system policy decisions;
- l. Preparation, approval, execution and filing of applications and other documents with the FCC, and with state and local governmental agencies and regulatory bodies;
- m. Preparation, approval, execution and filing of federal, state and local tax returns;
- n. Negotiations with vendors, banks and other sources of capital for financing of system facilities, construction and working capital;
- o. Receipt of moneys and profits from system operations, and distributions to system owners;
- p. Commencement, prosecution and settlement of litigation concerning the system;
- q. Criteria or grounds for termination of TDS as system manager; and
- r. Meetings with, visits by and reports to system owners and their representatives concerning system design, construction, alterations and improvements, management, operations or finances.

8. All documents reflecting, referring, or relating to any statements, complaints, allegations or charges by or on behalf of an FCC-authorized controlling owner of a cellular telephone system managed by TDS that TDS had charged excessive fees, made erroneous or improper management decisions or exceeded its managerial authority, or that TDS had attempted to or did exercise improper, unauthorized or excessive control of the management or operation of the cellular system in question, under applicable FCC standards or otherwise, including without limitation all litigation files and other documents relating to any civil or administrative litigation concerning any such matter to which TDS was a party, and all documents reflecting the ultimate resolution of such statements, complaints, allegations, charges or litigation.

9. All contracts and agreements pursuant to which any cellular telephone system owned, controlled or managed by TDS at any time has provided switching services to, obtained switching services from, or shared a Switch with, any other cellular telephone system, and all documents reflecting, referring or relating to the charges, costs, profitability, efficiencies, inefficiencies, benefits, drawbacks, or economics of such arrangements, or to the parties' rights, obligations, policies or practices with respect to access to the Switch or other equipment by the non-owner of the Switch.

10. All documents reviewed or relied upon in preparing the Affidavit of H. Donald Nelson dated July 6, 1988, the Affidavit of Richard W. Goehring dated June 30, 1988, the Declaration of H. Donald Nelson dated July 27, 1988, and the Supplemental Affidavit of Richard W. Goehring dated July 22, 1988, copies of which are attached hereto, all documents relating to the subject matter thereof, and all documents relating to their preparation.

11. All documents that support, tend to support, refute, tend to refute, or are relevant in any way to TDS' allegations that Amcell has assumed de facto control of the Atlantic City System, including without limitation all documents upon which such allegations are based.

12. All documents that are relevant to the issue designated for hearing in the FCC's November 28, 1994 Order ("Order") in this matter.

13. All documents relating in any way to the application of the six Intermountain Microwave control factors quoted in the Order to the conduct of Thompson and Amcell with respect to the Atlantic City System, or to any of the matters specifically referred to in the Order in connection therewith.

14. All documents TDS intends to introduce at the hearing in this matter.

15. All documents relating to Thompson, Amcell or the Atlantic City System prepared by, reviewed by or addressed to any witness whose testimony TDS intends to submit at the hearing in this matter.

16. All affidavits, declarations and other sworn statements, and all transcripts of deposition or hearing testimony, given, made or submitted by any TDS employee, agent or representative to the FCC, a state regulatory agency, or any court or tribunal, relating to real party in interest or unauthorized transfer of control issues, the FCC's Intermountain Microwave control criteria, or the application of those criteria to the facts or circumstances of any particular situation.

17. All documents that would be responsive to any TDS request to Amcell for production of documents in this proceeding that are in TDS' possession.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TELEPHONE AND DATA SYSTEMS, INC.,
et al.,

Plaintiffs,

v.

AMERICAN CELLULAR NETWORK CORP.,
et al.,

Defendants.

Civil Action No. 88-0264 HHG
(Judge Harold H. Greene)

AFFIDAVIT OF H. DONALD NELSON

City of Park Ridge)

) ss:

County of Cook)

H. Donald Nelson, being duly sworn, states as follows:

1. I am President of United States Cellular Corporation ("USCC"). My business address is 1030 Higgins Road, Park Ridge, Illinois 60068.

2. USCC is engaged in the telecommunications business, specifically in the ownership, construction, operation, and maintenance of cellular telecommunications systems. In my capacity as President of USCC, I have personal knowledge of various aspects of the design, planning, construction, operation, and maintenance of non-wireline cellular telecommunications systems.

3. On or about June 13, 1986, USCC entered into an agreement with Ellis Thompson, whereby USCC obtained an option to acquire Mr. Thompson's prospective interest in the Federal Communications Commission ("FCC") authorization to construct and operate a non-wireline cellular system for the Atlantic City New Jersey Metropolitan Statistical Area ("Atlantic City Market"). Pursuant to USCC's contract

- 2 -

with Thompson, as amended, USCC's consent was required before Thompson entered into material, long-term contracts relating to the Atlantic City system.

4. During November, 1987, I was informed that American Cellular Network Corporation ("AmCell") had apparently made a proposal to Thompson whereby AmCell would construct the Atlantic City system (the "AmCell proposal"). Pursuant to our prior agreement with Thompson, Thompson sought USCC's consent for AmCell's proposal.

5. AmCell's proposal to construct the Atlantic City system is critically flawed in several respects. AmCell's proposal will impose unreasonable and unnecessary expenses on the Atlantic City system. Accordingly, USCC reasonably withheld its consent to AmCell's proposal. In spite of USCC's reasonable refusal to consent to AmCell's proposal, Thompson and AmCell apparently entered into an agreement based upon AmCell's proposal.

6. Under AmCell's proposal, AmCell will not itself construct the Atlantic City system. Rather, AmCell's proposal contemplates that Motorola would construct the system on a turn key basis. In spite of the fact that Motorola, and not AmCell will construct the system, AmCell has included in its proposal an additional 10% fee to AmCell, over and above the turn key construction costs. This additional 10% fee is excessive and is unjustified.

7. Moreover, AmCell proposes to build the Atlantic City system without a switch. A switch is a critical component of any cellular system. Instead, AmCell proposes to employ its switch for the Wilmington, Delaware system to handle calls for the Atlantic City Market and to charge the owners of the Atlantic City Market switching fees for use of the Wilmington switch. Monthly charges for switching services to the owners of the Atlantic City Market could be approximately \$20,000 per month by the end of 1989, or in excess of \$240,000.00 per year.

- 3 -

8. AmCell's proposal also does not address the additional charges that could be incurred in transferring the signal from the Atlantic City Market to the Wilmington switch and back under AmCell's proposal. These charges could result in additional expenses to the owners of the Atlantic City Market of approximately \$288,000 per year for the duration of AmCell's agreement with Thompson.

9. Accordingly, AmCell's proposal to lease switching services from AmCell's Wilmington switch rather than to construct a switch for the Atlantic City Market could entail additional expenses estimated at \$528,000.00 per year. None of these charges would be incurred if a switch were installed in the Atlantic City Market. The cost of such a switch would be less than the cost of one year's fees for switching services and facility charges under AmCell's proposal.

10. AmCell's proposal is not reasonable or prudent. Rather, AmCell's proposal is indefinite and likely does not account for all of the costs that will be borne by the owners of the Atlantic City Market. In addition, AmCell's proposal could result in additional expenses to the owners of the Atlantic City Market in excess of \$500,000 per year for switching and facility charges that would not have to be incurred were a switch installed.

11. By substantially reducing the revenues from the Atlantic City System, AmCell's proposal will damage USCC. In view of the technical deficiencies of AmCell's proposal, the precise amount of that damage cannot be determined with reasonable certainty at this time. Even ignoring those technical deficiencies, however, AmCell's

- 4 -

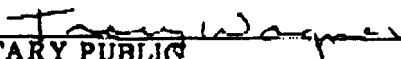
proposal will result in unreasonable and unnecessary expenses in excess of \$500,000 per year to the owners of the Atlantic City System for the duration of the agreement between Thompson and AmCell.

FURTHER AFFIANT SAYETH NOT.

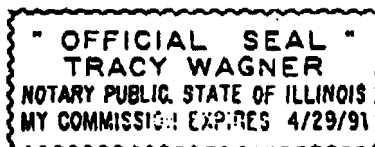


H. DONALD NELSON
President
United States Cellular Corporation

Sworn to and subscribed to before me this 6th day of July, 1988.


NOTARY PUBLIC

My commission Expires: 4/29/91



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TELEPHONE AND DATA SYSTEMS, INC.,
et al.,

Plaintiffs,

v.

AMERICAN CELLULAR NETWORK CORP.,
et al.,

Defendants.

Civil Action No. 88-0264 HHG
(Judge Harold H. Greene)

DECLARATION OF H. DONALD NELSON

H. Donald Nelson declares as follows:

1. I am President of United States Cellular Corporation ("USCC"). My business address is 1030 Higgins Road, Park Ridge, Illinois 60068.

2. USCC is engaged in the telecommunications business, specifically in the ownership, construction, financing, operation, and maintenance of cellular telecommunications systems. In my capacity as President of USCC, I have personal knowledge of various aspects of the design, planning, construction, operation, and maintenance of non-wireline cellular telecommunications systems.

3. I have reviewed the Declaration of Sidney Azecz filed in support of Defendants' Statement of Points and Authorities in Opposition to Motion for Preliminary Injunction filed by defendants American Cellular Network Corp. and AmCell of Atlantic City, Inc. (collectively referred to as "AmCell") in this case. Mr. Azecz's declaration contains a number of material misstatements and omissions that are critical to the issues

- 2 -

in this proceeding and to plaintiffs' Telephone and Data Systems, Inc. ("TDS") and United States Cellular Corporation's ("USCC") motion for a preliminary injunction.

4. Mr. Azeez in his declaration places heavy reliance on the FCC's decision in Madison Cellular Telephone Company and on reports by Robert R. Nathan Associates, Inc. ("Nathan report"), and Comp Com, Inc. ("Comp Com report"), in reaching the conclusion that the switch-sharing feature of the AmCell's proposal is an economically viable option for the Atlantic City System relative to owning and operating a switch of its own. ^{1/} Mr. Azeez reliance on those materials is misleading.

5. The January 1986, Nathan report is outdated and relies on assumptions that are presently incorrect regarding the cost of purchasing a switch relative to the cost of leasing switching services. The Nathan report's projections of the difference in system profitability in the fifth year of operation, as between shared switch and stand-alone modes of operation, contained in Table 16 of Exhibit B to Mr. Azeez's Declaration, are incorrect and are based upon certain assumptions that are no longer true. For example, Mr. Azeez states that a stand-alone switch would cost "upwards of a million dollars or more." Azeez Decl. ¶8. This is not correct. The cost of digital cellular switches has fallen precipitously during the past two years, since the Nathan report was prepared. At the present time, TDS and USCC could acquire a digital cellular switch and all of the facilities required to house and support it for less than a third of that amount. Installing the Motorola equipment that Mr. Azeez claims is needed in order to tie into a non-wireline wide area network would not cost more than 60% of that amount, even ignoring whatever discounts or financing options are available to AmCell from Motorola. Moreover, the figures given in Table 16 of the Nathan report as revenue

^{1/} The exhibit designations for the Robert R. Nathan Associates, Inc., and Comp Com, Inc., reports are misidentified in Mr. Azeez's affidavit. The Nathan report is attached as Exhibit B and the Comp Com report as Exhibit C to Mr. Azeez's affidavit.

revenue projections are inconsistent with Mr. Azeez's own estimates of the gross revenues from the System. Azeez Decl. ¶18. Even the partial revenue estimates supplied by Mr. Azeez are approximately twice the figures cited in the Nathan report.

6. The Comp Com report is also irrelevant to the economics of the Atlantic City Market and Mr. Azeez's reliance on it is misplaced. The Comp Com report presents an engineering analysis of cellular service to Rural Service Area ("RSA") markets and does not address the Atlantic City Market. The Comp Com report expressly acknowledges the differences between Metropolitan Statistical Area ("MSA") markets, such as the Atlantic City Market, which are characterized by high population densities and business cohesiveness, and Rural Service Area markets, which typically cover a large geographic area and are characterized by low population density. Comp Com report at 4, Exhibit C to Azeez Decl. The Comp Com report specifically states that "Design of cellular systems for most of the RSA's is significantly different than for MSA's." Id. The Comp Com study, therefore, is not an appropriate basis for comparison and cannot be used to draw conclusions regarding the Atlantic City Market.

7. Mr. Azeez does not dispute that AmCell's switching scheme will impose costs on the Atlantic City System of approximately \$240,000 per year. Nor does Mr. Azeez dispute that these are costs that the Atlantic City System would not have to incur if it acquired and operated its own switch. Azeez Decl. ¶9. Based on the magnitude of these charges, a switch could be purchased and operated for the Atlantic City Market for approximately two years' switching fees under AmCell's proposal.

8. Mr. Azeez's statement that TDS and USCC "could not possibly purchase, operate and maintain its own switch at an average unit cost less than or equal to the \$0.05 per minute fee for switching services specified in the AmCell/Thompson agreement" is false. Azeez Decl. ¶9. TDS and USCC could operate a switch for the Atlantic City Market at an average cost of approximately \$0.03 per minute. USCC is

currently doing so in markets of similar size, having comparable populations, number of cells, and customer usage levels. Purchasing a switch for the Atlantic City Market would allow the owners of the Atlantic City System to reduce the operating costs to the Atlantic City System by approximately \$100,000 per year, relative to leasing switching services under AmCell's proposal.

9. Mr. Azeez represents in his declaration that the \$1,250,000 cap on construction costs includes all necessary facilities to transport calls from the Atlantic City System to AmCell's Wilmington switch and back. In contrast to Mr. Azeez's representations, AmCell's proposal does not provide sufficient detail to determine whether or not those facility charges are included in AmCell's construction cap, absent the supplemental explanation supplied by Mr. Azeez's declaration.

10. Mr. Azeez's allegation that "it is not possible to add a system to the Northeast corridor non-wireline network that does not employ a Motorola switch," Azeez Decl. ¶13, is incorrect and is extremely misleading. First, there is no entity that is known as the "Northeast corridor non-wireline network," referred to by Mr. Azeez in his declaration. More important, Mr. Azeez concedes that the industry is presently in the process of developing technical standards that would make it feasible to link Motorola and other types of switching equipment in the same non-wireline wide area network. Azeez Decl. ¶14. At this time, the Electronic Industry Association, Cellular Telecommunications Industry Association, and manufacturers of cellular telecommunications equipment are actively developing technical standards. Moreover, systems are currently in operation that accomplish the same function of allowing a call to proceed across a system boundary without having to redial the call. It is currently possible to transfer calls between a system using a Motorola switch and another system using a non-Motorola switch by an operation referred to as "follow me roaming" that is similar to a "call forwarding" feature. This type of system is currently in operation in

cellular systems in Florida and Texas. For example, USCC is a partner in a system in Florida, Central Florida Cellular, that is part of a non-wireline wide area network that ties together systems using switching equipment manufactured by a number of different manufacturers such as Motorola, AT&T, Northern Telecom, and Astronet. Similar systems are currently in operation in Texas in the Houston and Corpus Christi areas.

11. In order to integrate the Atlantic City system into a non-wireline wide area network, there must first be sufficient physical overlap between the coverage of the cells that will be constructed for the Atlantic City System and the cells of an adjoining system that is part of a non-wireline wide area network. Second, there must be agreement between the owners of the Atlantic City System and the owners of the adjoining system to provide wide area network service across the boundary between their respective systems. Mr. Azeez's Declaration falls to establish that both of these requirements will be met for the Atlantic City System and, if so, when they will be met.

12. Mr. Azeez's assertions regarding the alleged benefits of participation in a non-wireline wide area network are overstated. Azeez Decl. ¶13-17. Participation in a non-wireline wide area network is primarily a marketing issue rather than a factor substantially affecting performance of the System. In reality, the benefits of participation in a non-wireline wide area network are minimal. Since the duration of the average cellular call is about 2 minutes, or less, it is unlikely that a substantial proportion of calls in the Atlantic City System would be interrupted even were non-wireline wide area network service unavailable. Even if a call is interrupted, the customer need only redial the call.

13. In any event, the alleged benefits of non-wireline wide area network service cited by Mr. Azeez could be secured to the Atlantic City Market, while at the same time eliminating unnecessary expenses of approximately \$100,000 per year, by

installation of a Motorola switch for and in the Atlantic City Market. Were a Motorola switch purchased for the Atlantic City Market, there would be no "hole" in the non-wireline wide area network of the type alleged by Mr. Azeez. Azeez Decl. ¶15. By installing a Motorola switch in the Atlantic City Market, the Atlantic City System could be added to a non-wireline wide area network from its inception. Regardless which type of switch is installed in the Atlantic City Market, the alleged benefits of a non-wireline wide area network could be available to the Atlantic City Market within the first year of operation.

14. Mr. Azeez's statement that "[i]f AmCell is not permitted to build the Atlantic City System, and the System is built with non-Motorola equipment, AmCell will not place its customers on the System, because the System will not be able to provide wide area service to AmCell's customers comparable to that provided by the wireline carrier," Azeez Decl. ¶17, is an irrational threat.

15. By refusing to transfer its customers to the non-wireline System, AmCell would merely ensure that its customers will be deprived of the alleged benefits of a non-wireline wide area network service. If AmCell refuses to transfer its non-wireline customers to the non-wireline system, AmCell's customers will not be able to employ AmCell's non-wireline wide area service when they leave the Atlantic City System. Hence, AmCell's statement that it will refuse to transfer its customers to the non-wireline system will not ensure that its customers will receive better service. Rather, it will ensure that they will be deprived of the alleged benefits of wide area service from the non-wireline system.

16. Mr. Azeez's threat that AmCell would refuse to transfer its customers to the non-wireline system is also inconsistent with his statements regarding the need to construct the system without delay. Mr. Azeez contends that AmCell will be irreparably injured by delay in constructing the System. TDS and USCC believe that

AmCell is currently reselling service from the wireline system in the Atlantic City Market at a loss relative to AmCell's costs in providing that service. AmCell's threat to keep its customers on the wireline system will merely insure that AmCell will continue to loose money by reselling from the wireline system, even after the non-wireline system becomes operational.

17. Mr. Azeez's allegations regarding the effects of the injunction sought by TDS and USCC are overstated and incorrect. TDS and USCC does not seek to restrain Ellis Thompson from constructing the Atlantic City system. Nor does TDS or USCC desire to delay construction of the System. Accordingly, TDS and USCC have not requested that Thompson be restrained from constructing the System. Under the narrowly crafted injunction requested by TDS and USCC, Thompson would remain free to begin construction of the system immediately and is encouraged to do so. USCC firmly believes that construction of the system should take place as quickly as possible. Hence, the alleged harm complained of by Mr. Azeez would not result from the injunction sought by TDS and USCC. None of the potential sources of revenue referred to by Mr. Azeez would be lost. Azeez Decl. ¶18. Hence, AmCell would not be irreparably harmed by a preliminary injunction.

18. The figures provided by Mr. Azeez as to the magnitude of the harm AmCell would suffer are misleading. Mr. Azeez states that lost revenues would approximate \$250,000 per month based on TDS's and AmCell's existing customers alone. Azeez Decl. ¶18. He provides no basis for that figure, however. Moreover, the revenue figure provided by Mr. Azeez is a gross revenue figure. It does not account for the substantial costs that would be incurred by the System in earning revenues of that magnitude.